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Supreme Court, U.S.
FILED
00-1769 MAY 8 2000
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No. _____

In The

Supreme Court of the United States

RODNEY JACK STRAIN, Sheriff of St. Tammany Parish, in his official & private capacity,

Petitioner,

versus

DAVID DREW CLIFFORD, A/K/A Michael J. Coleman,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Court of Appeals decide the merits of an appeal on appellant's Motion to Proceed *In Forma Pauperis* without giving the Appellees a chance to be heard either orally or by brief?

PARTIES TO PROCEEDINGS

Besides the parties named in the caption of this petition, U.S. Marshals, Ron Gibbs, T. Goode, and R. Couret were defendants in these proceedings in the Fifth Circuit. Also, members of the medical department of the St. Tammany Parish Jail, which included Dr. Ted Brustowitcz, the Parish Coroner, and Gregory Smith were defendants in that court. Another defendant was Dr. Luis Matta. The decision of the United States Court of Appeals for the Fifth Circuit dismissed the plaintiff's claims against these defendants. Therefore, these parties are not involved in this Petition for Writ of Certiorari.

One sheriff's deputy was listed as a defendant in the Fifth Circuit as Warden Longino. However, this defendant had not been served in the District Court, and was therefore not a properly named defendant in the Court of Appeals.

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OPINIONS AND ORDERS BELOW

On December 10, 1999, the Court of Appeals for the Fifth Circuit granted respondent's Motion to Proceed *In Forma Pauperis* and decided the merits of his appeal without first giving the appellees a chance to be heard by either brief or oral argument (App. A). The Court determined that the opinion should not be published. On February 9, 2000, the Court of Appeals for the Fifth Circuit denied applicant's Motion for a Rehearing (App. E) and on March 15, 2000, denied applicant's Motion for a Stay of Mandate Pending Writs to this Honorable Court.

On March 10, 1999, the Honorable Mary Ann Vial Lemmon, Judge of the United States District Court for the Eastern District of Louisiana, issued an order approving and adopting as her own opinion the Report and Recommendation of the Magistrate Judge (App. B) and rendered judgment dismissing plaintiff's case as legally frivolous and for failure to state a claim (App. C). The United States Magistrate Judge, the Honorable Joseph C. Wilkinson, Jr., had rendered his Report and Recommendation to dismiss plaintiff's complaint with prejudice as legally frivolous and for failure to state a claim on February 9, 1999. The Magistrate's Report and Recommendation is attached as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered December 10, 1999 (App. A). The Court of Appeals denied a timely petition for rehearing

on February 9, 2000 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

2. Federal Rules of Appellate Procedure Rule 34(a)(2) provides:

   "Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

   (A) the appeal is frivolous;

   (B) the dispositive issue or issues have been authoritatively decided; or

   (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

STATEMENT OF THE CASE

In April of 1998, respondent David Drew Clifford A/K/A Michael J. Coleman was a federal inmate who was housed at the St. Tammany Parish Jail, Covington, Louisiana under a contract that the federal government

had with petitioner, the Sheriff of St. Tammany Parish, to house federal prisoners. Clifford filed this lawsuit under 42 U.S.C. §1983, alleging that his civil rights had been violated when he was allegedly injured by being attacked by another inmate on April 1, 1998. Clifford filed as a *pro se* plaintiff proceeding *in forma pauperis*. However, since the Fifth Circuit's opinion, the District Court has appointed Jane Johnson as Clifford's attorney.

Clifford did not seek any remedy whatsoever through the St. Tammany Parish Jail's Administrative Remedy Procedure (ARP). In April 1998, the St. Tammany Parish Jail had an administrative remedy procedure wherein Clifford could have filed a grievance. Under the jail's ARP, if Clifford was dissatisfied with the action of the jail officials on his grievance, he could have appealed the decision to the Sheriff. He never initiated the procedure.

In his original complaint, Clifford sued Ron Gibbs, a Supervisor Deputy of the United States Marshal Service in New Orleans, and Rodney Jack Strain, Sheriff of St. Tammany Parish. Plaintiff thereafter amended his complaint to list fourteen additional defendants, including numerous unidentified deputies and employees of the St. Tammany Parish Jail. None of these defendants were served in this matter.

The United States District Court for the Eastern District assigned the case to be heard before Magistrate Judge Joseph C. Wilkinson, Jr. Based on the allegations of the complaint, the Magistrate Judge ordered plaintiff to provide additional information to clarify the nature of his claims and on June 29, 1998, defendants were granted

relief from responding to plaintiff's claims awaiting further orders of the court.

On November 8, 1998, a *Spears* Hearing was conducted in accordance with Fifth Circuit Court's holding in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). After this hearing, the Magistrate Judge issued his Report and Recommendation on February 9, 1999, which recommended dismissal of all of the plaintiff's claims as frivolous and for failure to state a claim under 28 U.S.C. §1915(e)(2) and 42 U.S.C. §1997e(a). The Report and Recommendation was adopted by the United States District Judge, the Honorable Mary Ann Vial Lemmon, as her opinion. On March 10, 1999, Judge Lemmon rendered Judgment in favor of all defendants dismissing plaintiff's case with prejudice.

Plaintiff filed a Notice of Appeal on March 28, 1999. Plaintiff also filed a request to proceed *in forma pauperis*, which was denied by the District Court because the Court found that the appeal was not taken in good faith for the reasons outlined in the Report and Recommendation of the Magistrate Judge. Plaintiff then moved the Court of Appeals for the Fifth Circuit for permission to proceed *in forma pauperis*. The plaintiff also moved that Court for appointment of counsel. On December 10, 1999, the Fifth Circuit denied Clifford's request for an appointed counsel but granted Clifford's Motion to Proceed *In Forma Pauperis*. In that same decision, the Fifth Circuit also affirmed the District Court's dismissal of the defendants who were employed by the Federal Government but remanded and vacated the dismissal of one of plaintiff's claims, the failure to protect claim against the state defendants. By doing so, the Fifth Circuit decided the merits of the

appeal on Clifford's procedural motion to proceed *in forma pauperis*. No briefing schedule was ever entered on the appeal, no briefs were filed, and no oral arguments were heard on the merits of the appeal. By rendering a decision on the merits of an appeal when only a procedural motion was before the Court, the Court of Appeals has denied petitioner due process of law.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion in deciding the merits of an appeal on a plaintiff's Motion to Proceed *In Forma Pauperis* denied the petitioner the right to be heard in the Appellate Court. The right to be heard is a fundamental aspect of due process of law. *Goss v. Lopez*, 419 U.S. 577, 579, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975) and *Fuentes v. Shevin*, 407 U.S. 67, 80, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). By denying petitioner the right to be heard in the Appellate Court, the Fifth Circuit has denied petitioner due process of law contrary to the Fifth Amendment to the United States Constitution. Petitioner has been denied both liberty and property without due process. The Fifth Circuit's decision will require petitioner to expend funds for an expensive and costly trial, which under the laws of the United States should not be held. In addition, since petitioner is a defendant in many *pro se* inmate suits petitioner will lose property in future cases by having to pay attorney's fees to have his attorney defend the merits of an appeal when the Court of Appeals has not even decided if the plaintiff could proceed *in forma pauperis*. In future cases, should petitioner have his attorney brief the

merits of the appeal while the Court of Appeals is considering plaintiff's procedural motion?

In *Goss*, this Honorable Court held that a high school student could not be suspended from high school for misconduct without first being granted a hearing because to do so would deny him liberty and property without due process of law. Yet, the Fifth Circuit in this instant case has denied the Sheriff, who is being sued in his "official and private capacity," liberty and property without any hearing whatsoever. At a minimum, applicant should be entitled to some type of hearing either oral or written before his property and liberty interests as previously determined by a United States District Court are denied. The District Court determined the plaintiff's case should be dismissed for plaintiff's failure to exhaust available administrative remedies pursuant to 42 U.S.C. §1997e(a) (App. pp. 20-21). This issue was not even discussed by the Fifth Circuit. Petitioner should have been entitled to present the reasons why the District Court's decision should have been affirmed on this basis. Furthermore, the District Court specifically found that Clifford's civil rights had not been violated by the defendant's failure to protect him from another inmate. (App. pp. 29-34). The Sheriff should have been given the opportunity to present by brief the reasons why this decision is correct.

The issue before the Fifth Circuit was whether the District Court had abused its discretion. *Miranda v. United States*, 455 F.2d 402 (2d Cir. 1972). When the motion was before the Court of Appeals, the only issue on which that Court could rule was whether the District Court abused its discretion in denying Clifford the right to proceed *in*

forma pauperis. The merits of the appeal were to be heard only if the Court of Appeals determined that the District Court abused its discretion and that Clifford had a right to proceed *in forma pauperis*. Once this issue was determined, then the appeal should have been heard either by a brief or oral argument in accordance with Federal Rules of Appellate Procedure, Rule 34(a)(2). Also, Rules 28 and 31 show that at a minimum the appellee is entitled to file a brief. The Fifth Circuit Local Rule 34.2 provides that the Fifth Circuit is governed by Rule 34 of the Federal Rules of Appellate Procedure.

Rule 34(a)(2) of the Federal Rules of Appellate Procedure provides that oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agree that oral argument is not necessary. In this case, this rule was not followed by the Court of Appeals because no briefs on the merits of the appeal were filed. Petitioner was denied the right to be heard orally and was denied the right to present reasons in a brief why the decision of the trial court should have been affirmed. The procedure used by the Fifth Circuit violates the Fifth Amendment of the United States Constitution by denying due process of law to petitioner and it clearly violates Federal Rules of Appellate Procedure, Rule 34(a)(2), which is a statutory law of the United States imposing a mandatory duty upon the Court of Appeals.

CONCLUSION

This Honorable Court should grant a Writ of Certiorari and order the United States Court of Appeals for the Fifth Circuit to hear respondent's appeal on its merits, giving petitioner the right to be heard by brief and/or oral argument.

This 5th day of May, 2000.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30302
Summary Calendar

DAVID DREW CLIFFORD,

Plaintiff-Appellant,

versus

RON GIBBS, U.S. Marshals Service, in his official & private capacity, JACK STRAIN, in his official & private capacity; T. GOODE, U.S. Marshal; R. COURET, U.S. Marshal; WARDEN LONGINO; UNIDENTIFIED PARTIES; TED BRUCTOWICZ, Coroner, St. Tammany Parish; GREGORY SMITH; LUIS F. MATTA, Dr.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 98-CV-1227-S

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

David Drew Clifford, federal prisoner # 18116-034, appeals the district court's denial of his request for leave to proceed *in forma pauperis* (IFP) on appeal in accordance with *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Clifford's request for the appointment of appellate counsel is DENIED AS UNNECESSARY.

The district court did not abuse its discretion in dismissing as frivolous Clifford's denial of adequate medical care claim. *Norton v. Dimazana*, 122 F.3d 286, 291 (5th Cir. 1997). Regarding Clifford's failure-to-protect claim, the federal defendants (Gibbs, Goode, and Couret) may not be held liable under 18 U.S.C. § 4042 for the acts or omissions of the St. Tammany Parish Jail employees. *Logue v. United States*, 412 U.S. 521, 528-30, 532 (1973).

The district court's dismissal as frivolous of Clifford's failure-to-protect claim against the state defendants, however, was premature and thus an abuse of discretion. To establish a failure-to-protect claim, an inmate must show that he was "incarcerated under conditions posing a substantial risk of serious harm and that prison officials were deliberately indifferent to his need for protection." *Neals v. Norwood*, 59 F.3d 530, 533 (5th Cir. 1995).

When the jail officials simultaneously released Clifford and fellow inmate James Brown from lockdown for the second time, the two inmates had been in three fights,

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

Brown had attacked Clifford immediately upon their release from lockdown the first time, and Clifford had allegedly informed Deputy Mayo that he was afraid of more trouble. No measures were allegedly taken to abate the risk that Brown would again attack Clifford upon their second simultaneous release from lockdown. Accepting Clifford's pleaded facts as true, his complaint has an arguable basis in both law and fact for both elements of an Eighth Amendment claim. *Neals*, 59 F.3d at 533.

Clifford's motion for IFP is therefore GRANTED. The district court's dismissal of Clifford's denial-of adequate-medical-care claim and Clifford's failure-to-protect claim as it relates to the federal defendants is AFFIRMED. The district court's dismissal of Clifford's failure-to-protect claim as it relates to state defendants is vacated and remanded for further factual development.

MOTION FOR IFP GRANTED; AFFIRMED IN PART; VACATED AND REMANDED IN PART; MOTION FOR APPOINTMENT OF COUNSEL DENIED AS UNNECESSARY.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAVID DREW CLIFFORD	**CIVIL ACTION**
VERSUS	**NO: 98-1227**
RON GIBBS, ET AL.	**SECTION: "S" (2)**

ORDER

The court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the magistrate judge and plaintiff's objections to the findings of the magistrate judge, hereby approves the Report and Recommendation of the magistrate judge and adopts it as its opinion in this matter.

Therefore,

IT IS ORDERED that plaintiff's complaint is hereby **DISMISSED WITH PREJUDICE** as legally frivolous and for failure to state a claim under 28 U.S.C. § 1915(e)(2).

New Orleans, Louisiana, this 10 day of March, 1999.

(Signed by Mary Ann Vial Lemmon)
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAVID DREW CLIFFORD	**CIVIL ACTION**
VERSUS	**NO. 98-1227**
RON GIBBS ET AL.	**SECTION "S" (2)**

JUDGMENT

The Court having approved the Report and Recommendation of the United States Magistrate Judge and having adopted it as its opinion herein; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of all defendants, Deputy United States Marshals Ron Gibbs, T. Goode and R. Couret; Jack Strain, Sheriff of St. Tammany Parish; Warden Longino; Ted Bructowicz, Coroner for St. Tammany Parish; Assistant St. Tammany Parish Coroner "Jim" (whose last name is unknown); Gregory Smith, St. Tammany Parish Jail ("STPJ") record custodian; Dr. Luis F. Matta; STPJ correctional officer Mayo; four unidentified STPJ correctional officers; two unidentified STPJ wardens; an unidentified security officer and supervisor; and a STPJ "captain" and against plaintiff, David Drew Clifford, dismissing plaintiff's complaint with prejudice as legally frivolous and for failure to state a claim under 28 U.S.C. §1915(e)(2).

New Orleans, Louisiana, this 10 day of March, 1999.

(signed by Mary Ann Vial Lemmon)
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAVID DREW CLIFFORD	**CIVIL ACTION**
VERSUS	**NO. 98-1227**
RON GIBBS ET AL.	**SECTION "S" (2)**

REPORT AND RECOMMENDATION

Plaintiff David Drew Clifford is a convicted bank robber currently incarcerated in the United States Penitentiary in Beaumont, Texas. He filed this pro se and in forma pauperis complaint pursuant to 42 U.S.C. § 1983 against Deputy United States Marshals Ron Gibbs, T. Goode and R. Couret; Jack Strain, Sheriff of St. Tammany Parish, and his deputy, Warden Longino; Ted Bructowicz, Coroner for St. Tammany Parish; Assistant St. Tammany Parish Coroner "Jim" (whose last name is unknown); Gregory Smith, the St. Tammany Parish Jail ("STPJ") records custodian; Dr. Luis F. Matta; STPJ correctional officer Mayo; four unidentified STPJ correctional officers; two unidentified STPJ wardens; an unidentified security officer and supervisor; and an unidentified STPJ "captain."

Plaintiff asserts seven general claims[1] arising during his incarceration in the STPJ during the six-month period

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[1] During the course of the preliminary conference on November 5, 1998, plaintiff voluntarily dismissed an eighth claim for denial of access to an adequate law library that he had included in his written submissions. Record Doc. No. 76 and 78.

of January – June 1998: 1) various conditions of his confinement were constitutionally inadequate, including outdoor recreation and shower and sink facilities; 2) defendants violated his due process rights when they did not provide proper disciplinary procedures before placing plaintiff in lockdown; 3) defendants failed to protect plaintiff from attack by another inmate; 4) defendants used excessive force when they sprayed plaintiff with pepper spray while trying to break up a fight between plaintiff and another inmate on April 2, 1998; 5) plaintiff received constitutionally inadequate medical care for injuries resulting from a fight with another inmate; 6) plaintiff experienced a two-month delay in receiving a special diet required by his medical condition; and 7) defendants violated 18 U.S.C. § 4086, which plaintiff alleges governs the housing of federal prisoners in state facilities. He seeks compensatory and punitive damages, declaratory relief and any other relief this Court may deem appropriate. Record Doc. No. 1, p. 14; Record Doc. No. 28, p. 15-16.

On November 2, 1998, defendants Gibbs, Goode and Couret, the deputy United States Marshals, filed a motion to substitute and dismiss plaintiff's complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Record Doc. No. 74. I ordered that defendants' motion to substitute and dismiss be treated as a motion for summary judgment. Plaintiff was ordered to respond to the motion by November 23, 1998, Record Doc. No. 75, and he has done so. Record Doc. No. 81.

On November 5, 1998, I conducted a telephone conference in this matter. Participating were plaintiff pro se and Fred T. Hinrichs and R. Bradley Lewis representing some of the defendants. Plaintiff was sworn and testified for all purposes permitted by *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), and its progeny.

THE RECORD

Clifford testified that he was convicted of federal bank robbery charges in Mississippi on December 4, 1997 and sentenced to 76 months in prison. Plaintiff stated that he was also convicted of federal bank robbery charges in this Court on May 27, 1998 and sentenced to eight years in prison. He testified that his sentences run concurrently. He stated that his claims in this case relate exclusively to the six-month period he was incarcerated in the STPJ, January through June 1998.

As to Clifford's first claim, he testified that various conditions of his confinement at STPJ were constitutionally inadequate, including outdoor recreation and shower and sink facilities. Clifford testified that he only received one hour per week of outdoor recreation, instead of the three hours per week provided in the American Correctional Association handbook. He testified that he was told he was not allowed additional time for outdoor recreation because there was insufficient security at STPJ to monitor outdoor recreation. Plaintiff said that "transport deputies were assigned to monitor outdoor recreation at STPJ and "the only time we [inmates] were allowed out is when the transport deputies did not have other duties." Clifford said the cells at

STPJ were double occupancy and approximately eight by twelve feet (8' x 12') in size and that while it was possible for him to do sit-ups and push-ups in his cell, he chose not to do any. Clifford testified that he was housed with approximately thirty other federal inmates who had to share three showers, only two of which worked properly. Plaintiff complained that the sink did not work during the entire duration of his incarceration in STPJ. Clifford testified that he was allowed to shower daily.

As to Clifford's second claim, he testified that defendants violated his due process rights when they did not provide proper disciplinary procedures before placing him in lockdown. Plaintiff stated that upon arrival at STPJ he was given a St. Tammany Parish Jail handbook setting forth the jail's rules and regulations. Clifford said the handbook described the disciplinary procedures to be followed at the jail, which included giving inmates "written write-ups" concerning disciplinary charges, notice of hearing and a hearing on any alleged disciplinary violations.

Clifford testified that he was improperly disciplined on four occasions. Plaintiff stated that he was in several fights with inmate James Brown on April 1, 2 and 4, 1998. Clifford testified that after each of the initial two fights with Brown, he was issued a "verbal twenty-four hour lockdown" and after his final fight with Brown he was given a "verbal indefinite lockdown" that lasted ten or eleven days. Clifford stated that he was also given a verbal twenty-four hour lockdown on another occasion for failing to wear a shirt outside of his cell. Plaintiff alleged that each time he was placed in lockdown "[n]o written notice of the reason for the lockdown were [sic]

given, no disciplinary report was issued to the plaintiff nor was a disciplinary hearing held. . . . " Record Doc. No. 42 (Plaintiff's Written Response to Court's Order of 6/12/98), p. 3, 4.

Clifford testified that STPJ does not have separate disciplinary detention facilities and that lockdown consisted of cell confinement. Plaintiff testified that during lockdown he could leave his cell only to take a shower on Monday, Wednesday and Friday. Clifford stated, however, that except for being able to leave his cell only for showers, he was not denied any other privileges while in lockdown.

As to Clifford's third claim, he alleged that defendants failed to protect his from attack by inmate James Brown. Plaintiff testified that he was involved in four fights with Brown, three of which were observed by prison officials. Clifford stated that the first fight with Brown occurred on April 1, 1998 at about 9:20 p.m. Plaintiff said that he was playing cards with Brown when they argued and began fighting. Clifford testified that the fight was unobserved by prison officials, lasted about four minutes and was broken up by other inmates. Clifford testified that he had not had other fights or arguments with Brown prior to this incident. Clifford stated that Brown was upset after this first incident because "he didn't make a good showing" in the fight in front of the other inmates.

Clifford stated that after the inmates broke up the fight, Brown immediately went to his cell, put on his tennis shoes, returned within minutes to where they had been playing cards and attacked plaintiff again. Plaintiff

testified that this second fight lasted about two minutes. Clifford stated that his fight was observed by a deputy stationed in the security booth for the tier in which plaintiff and Brown were housed. Plaintiff testified that the deputy called for assistance, and five other deputies arrived and separated plaintiff and Brown. Plaintiff stated that as a result of the fight he suffered minor bruises and a black eye.

Clifford testified that both he and Brown were placed in lockdown in their respective cells for twenty-four hours after the second fight. Plaintiff stated that Brown was a federal inmate like himself and that all federal inmates were kept on the same tier in STPJ. Clifford testified that Brown was in Cell 15 and Clifford was in Cell 17, located about six feet from Brown's cell. Plaintiff stated that his third fight with Brown occurred immediately upon their release from lockdown. Clifford testified that jail officials simultaneously released him and Brown from lockdown by opening their cell doors automatically from the security booth, at which time plaintiff asked Brown "if it was over." Clifford said that Brown replied "no," immediately charged and began fighting with Clifford again.

Clifford testified that the deputy stationed in the security booth witnessed the fight and again called for assistance. Plaintiff stated that approximately five deputies arrived within a "couple of minutes" after the fight began and separated plaintiff and Brown by spraying them both in the face with pepper spray. Plaintiff stated that Brown was taken immediately to the shower in the "booking area" to rinse off the pepper spray residue. Clifford said that he was detained in another room for

about twenty minutes, after which he was allowed to rinse off the pepper spray residue. Plaintiff testified that he spoke to Deputy Mayo during the wash-off procedure and informed him that there would probably be further problems between Clifford and Brown and Mayo replied that he would speak to the lieutenant about it. Clifford testified that he was then taken to "medical" in STPJ where his nose was examined and determined not to be broken.

Clifford testified that he and Brown were confined to their respective cells for another twenty-four hour lockdown. Plaintiff stated that they were simultaneously released again from lockdown on April 4, 1998. Clifford testified that upon their release Brown "rushed" him and struck Clifford with his fist. Plaintiff stated that this final fight lasted three or four minutes and was broken up by jail officials. He testified that he was taken to St. Tammany Parish Hospital for examination about one-and-a-half-hours later, and upon his return to STPJ he was placed in lockdown. Clifford testified that his maxillary sinus, right eye orbital rim and thyroid cartilage were fractured in this last fight.

He complained that after the second fight, deputies should have done something about the problems between him and Brown. Clifford stated that Brown was moved to another jail after their final fight.

Clifford's fourth claim is that defendants used excessive force against him when they used pepper spray to break up the fight between plaintiff and Brown on April 2, 1998. Plaintiff complained that he had to wait twenty minutes before prison officials allowed him to rinse off

the pepper spray residue. Plaintiff said that he should not have been pepper sprayed and that he should have been allowed to wash off the residue sooner.

In his fifth claim, Clifford alleges that he received constitutionally inadequate medical care for his fractured maxillary sinus, right orbital rim and right thyroid cartilage resulting from his final fight with Brown on April 4, 1998. Plaintiff testified that he was taken to the jail medical department immediately after the fight, and Nurse Fortenberry called the deputy United States marshals on duty to inform them that plaintiff should be taken to the hospital for further examination. Clifford stated that he was taken to St. Tammany Parish Hospital about ninety minutes after the fight because he had to wait for a "transport unit" to become available.

Clifford testified that he was given an x-ray at the hospital, and Dr. Matta diagnosed him with multiple contusions, prescribed motrin and sent him back to STPJ. Plaintiff stated that he was experiencing problems swallowing and complained to medical personnel at STPJ. Clifford said that he was taken back to the emergency room at St. Tammany Parish Hospital on April 9, 1998 at which time he was examined and given a CT scan. Plaintiff testified that the CT scan revealed that he had a fractured maxillary sinus, right orbital rim and right thyroid cartilage. Clifford testified that he was prescribed antibiotics and darvocet for possible sinus infection. Plaintiff stated that the doctor at the hospital also referred plaintiff to an "ENT specialist." Clifford testified that he was examined by Dr. Beatrous, an ENT specialist, at his private office in Mandeville on April 10, 1998. Plaintiff stated that Dr. Beatrous reviewed the CT scan

and confirmed the diagnosis made by the doctor at St. Tammany Parish Hospital on April 9, 1998. Clifford testified that Dr. Beatrous told him that nothing could be done for the fractures and that they would have to heal on their own. Plaintiff stated that he had a follow-up visit with Dr. Beatrous on May 27, 1998.

Clifford testified that he was examined by Dr. Ballard at the STPJ at least three times after his last fight with Brown. Plaintiff stated that sometime in late April or early May 1998, Dr. Ballard recommended that plaintiff undergo an EEG and an MRI and referred him to a neurologist. Clifford stated that when he was sentenced by United States District Judge Sarah S. Vance on May 27, 1998 for his federal bank robbery conviction, he told the Court that he had not received the tests ordered by Dr. Ballard. Plaintiff testified that Judge Vance ordered that Clifford be given the tests directed by Dr. Ballard. Clifford stated that he was examined by Dr. Beatrous on May 28, 1998. Plaintiff testified that he was taken to Charity Hospital on June 8, 1998 and examined by a neurologist who scheduled an MRI for plaintiff. Clifford testified that the neurologist told plaintiff that "the fracture of the maxillary sinus healed depressed" and that his "face was out of line – asymmetrical."

Clifford testified that he wrote a letter to Judge Vance and Deputy Marshal Gibbs requesting that he not be transferred to another facility until he had completed the tests ordered by the neurologist. Plaintiff stated that he was nevertheless transferred from STPJ to a federal detention facility on June 30, 1998 before the MRI was performed.

Clifford's sixth claim is that he experienced a delay in receiving a special diet required by his medical condition. Plaintiff testified that upon his arrival at STPJ he informed STPJ officials that he suffered from hypoglycemia and that he required a high protein and low carbohydrate diet. Clifford stated that he did not receive the special diet until two months after he arrived at STPJ.

As to Clifford's final claim, plaintiff testified that defendants violated 18 U.S.C. § 4086, which he alleged governs the housing of federal prisoners in state facilities. He stated that STPJ officials breached their contract with the United States Marshal's Service in their handling of his incarceration and, therefore, violated 18 U.S.C. § 4086.

Clifford confirmed during his testimony that he had received a copy of the verified medical records, Record Doc. No. 77, provided by defendants in response to my order, Record Doc. No. 6. Plaintiff testified that the records were basically accurate, except that they appeared to be missing the records of his CT scan and examination of April 9, 1998 and Dr. Beatrous' subsequent report interpreting the April 9, 1998 CT scan.

The medical records generally confirm the material aspects of plaintiff's testimony. Specifically, they confirm that plaintiff was examined by STPJ nurse Fortenberry following his fight with Brown on April 4, 1998 and prescribed motrin and that Fortenberry recommended that plaintiff be taken to St. Tammany Parish Hospital to rule out fractures and internal bleeding. Record Doc. No. 77 (STPJ Medical Report dated 4/4/98). The medical records show that Dr. Matta was the attending physician

and that plaintiff was taken to St. Tammany Parish Hospital on April 4, 1998, where a "facial and L-spine x-ray" was taken. *Id.* (St. Tammany Parish Hospital Emergency Record dated 4/4/98). The medical records confirm that Dr. Matta diagnosed plaintiff with multiple contusions and prescribed plaintiff 600 miligrams of motrin. *Id.*

The medical records also show that plaintiff complained on April 9, 1998 of a sore throat and pain when swallowing and that plaintiff was referred by STPJ Dr. Bructowicz to St. Tammany Parish Hospital for further evaluation. *Id.* (STPJ Inmate Request for Medical Attention dated 4/9/98; Request for Medical Treatment dated 4/9/98). The medical records confirm that on June 8, 1998 plaintiff was taken to Charity Hospital in New Orleans and a neurologist examined his head, eyes, ears and throat and recommended that he be given an MRI of his cervical and lumbar spine and maxillary bone on the right side of his face. *Id.* (Medical Center of New Orleans Inmate Progress Notes dated 6/8/98).

On cross-examination, plaintiff testified that he filed administrative grievance forms regarding prison officials' delay in providing him with a special diet for his medical condition and possibly for the inadequate medical care for his fractures. Clifford testified that he did not file a grievance regarding the fights with Brown, the pepper spray incident, alleged unconstitutional conditions of confinement, violation of 18 U.S.C. § 4086 and the lack of due process following the disciplinary procedures. Clifford testified that he believes Dr. Matta and Dr. Beatrous are private physicians and not STPJ employees. Plaintiff acknowledged that Brown was a federal prisoner and that all federal prisoners were housed on the same tier.

Finally, plaintiff testified that he still has not received the MRI ordered by the neurologist at Charity Hospital on June 8, 1998.

I. ANALYSIS

A. Standards of Review

"A federal court may dismiss a claim in forma pauperis 'if satisfied that the action is frivolous or malicious.' " *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994) (quoting former 28 U.S.C. § 1915(d), now incorporated in 28 U.S.C. § 1915(e), as amended). A complaint is frivolous "if it lacks an arguable basis in law or fact." *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998); *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994). The law " 'accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.' " *Macias v. Raul A. (Unknown), Badge No. 153*, 23 F.3d 94, 97 (5th Cir. 1994) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

The purpose of a *Spears* hearing is to dig beneath the conclusional allegations of a pro se complaint, to ascertain exactly what the prisoner alleges occurred and the legal basis of the claims. *Spears*, 766 F.2d at 180. "[T]he *Spears* procedure affords the plaintiff an opportunity to verbalize his complaints, in a manner of communication more comfortable to many prisoners." *Davis*, 157 F.3d at 1005-1006. The information elicited at such an evidentiary hearing is in the nature of an amended complaint or a more definite statement under Fed. R. Civ. P. 12(e). *Wilson*

v. Barrientos, 926 F.2d 480, 481 (5th Cir. 1991); *Adams v. Hansen*, 906 F.2d 192, 194 (5th Cir. 1990). "Upon development of the actual Nature of the complaint, it may also appear that no justiciable basis for a federal claim exists." *Spears*, 766 F.2d at 182.

The Court may make only limited credibility determinations in a *Spears* hearing, *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997) (citing *Cay v. Estelle*, 789 F.2d 318, 326-27 (5th Cir. 1986), *overruled on other grounds by Denton v. Hernandez*, 504 U.S. 25, 112 S.Ct. 1728 (1992)), and may consider and rely upon documents as additional evidence, as long as they are properly identified, authentic and reliable. "The court should allow proper cross-examination and should require that the parties properly identify and authenticate documents. A defendant may not use medical records to refute a plaintiff's testimony at a *Spears* hearing." *Id.* (citing *Wilson*, 926 F.2d at 482-83; *Williams v. Luna*, 909 F.2d 121, 124 (5th Cir. 1990)).

After a *Spears* hearing, the complaint may be dismissed as legally frivolous if it lacks an arguable basis in law, *Jackson v. Vannoy*, 49 F.3d 175, 176-77 (5th Cir. 1995); *Moore v. Mabus*, 976 F.2d 268, 269 (5th Cir. 1992), or "as factually frivolous only if the facts alleged are 'clearly baseless,' . . . [or] when the facts alleged rise to the level of the irrational or wholly incredible." *Id.* at 270.

" 'A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist.' " *Davis*, 157 F.3d at 1005 (quoting *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997)). "When a complaint raises an arguable question of

law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal under rule 12(b)(6) is appropriate, however, dismissal under the section 1915(d) standard is not." *Moore*, 976 F.2d at 269. A prisoner's complaint which fails to state a claim may be dismissed sua sponte at any time, regardless of his pauper status. 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1).

In evaluating Clifford's claims that state officials at STPJ violated his constitutional rights, 42 U.S.C. § 1983 is the legal basis for his assertion of such claims. As to his claims against the three deputy United States marshals, Clifford appears to assert a private cause of action for alleged violation of his constitutional rights against federal officials that is comparable to the statutory cause of action permitted against state officials by Section 1983 as recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Zuspann v. Brown*, 60 F.3d 1156, 1157 n. 2 (5th Cir. 1995); *Whitley v. Scott*, 158 F.3d 882, 885 n. 1 (5th Cir. 1998).

In this case, plaintiff's complaint must be dismissed under 28 U.S.C. § 1915(e)(2) and 42 U.S.C. § 1997e(c)(1), either as frivolous because it lacks an arguable basis in law or under Rule 12(b)(6) in light of his testimony explaining the factual basis of his claims. Plaintiff's complaint, as amended by his testimony at the *Spears* hearing, fails to state a claim under the broadest reading.[2]

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[2] Pro se civil rights complaints must be broadly construed, *Moore*, 30 F.3d at 620, and I have broadly construed the complaint in this case.

B. Failure to Exhaust Administrative Remedies at STPJ

42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Clifford testified that an administrative remedy procedure ("ARP") was available to inmates at STPJ, but that he filed ARP grievances concerning only his claims for inadequate medical care and for the delay in providing him with the special diet required by his medical condition. However, plaintiff alleged both in his complaint, Record Doc. No. 1, p. 1 (attachment to complaint) and Record Doc. No. 3, ¶ II, and in his amended complaint, Record Doc. No. 28, ¶ II, that he did not file *any* administrative complaints at STPJ. Accepting as true plaintiff's testimony that he did in fact file ARP grievances against STPJ officials concerning his alleged inadequate medical care and the delay in providing his special diet, all *other* claims alleged in this complaint *against STPJ officials* should be dismissed for plaintiff's failure to exhaust available administrative remedies pursuant to 42 U.S.C. § 1997e(a).

Plaintiff has alleged that, unlike his claims against STPJ official, no ARP was available for him to use in connection with his claims against the deputy United States marshal defendants. However, even assuming that the provisions of 42 U.S.C. § 1997e(a) are not applicable, the substance of plaintiff's complaint is insufficient to

state a constitutional violation under Section 1983 for the reasons set out below.

C. Conditions of Confinement

1. Legal Standards

Although Clifford was being held in STPJ in early 1998 awaiting trial on federal bank robbery charges in this Court, he was at all relevant times a convicted prisoner who was also being held based on his December 4, 1997 federal bank robbery conviction in Mississippi. The Eighth Amendment prohibits the infliction of cruel and unusual punishment on convicted prisoners. "Prison conditions constitute cruel and unusual punishment if they involve the 'wanton and unnecessary infliction of pain [or if they are] grossly disproportionate to the severity of the crime warranting imprisonment.' " *Hamilton v. Lyons*, 74 F.3d 99, 103-04 (5th Cir. 1996) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Hutto v. Finney*, 437 U.S. 678, 687 (1978)).

"Like other Eighth Amendment claims, a conditions-of-confinement claim must satisfy tests for both objective and subjective components." *Davis*, 157 F.3d at 1006 (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)); *accord Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991); *Downey v. Denton County*, 119 F.3d 381, 385-86 (5th Cir. 1997). Accordingly, this court "must ask both if 'the officials act[ed] with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a Constitutional violation." *Hudson*, 503 U.S. at 8 (quoting *Wilson*, 501 U.S. at 298, 303)). If the Court

finds that either the subjective or objective component of the test is not met, it need not address the other component. *Davis*, 157 F.3d at 1006.

With respect to the objective component, the Supreme Court in *Wilson* noted that routine discomfort is part of the penalty that convicted prisoners pay for having committed crimes. Therefore, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 at 347). "[E]xtreme deprivations are required to make out a conditions-of-confinement claim.' *Hudson*, 503 U.S. at 9.

With respect to the subjective component of the test, the Supreme Court has applied a deliberate indifference standard. *Wilson*, 501 U.S. at 303. "Deliberate indifference" means that a prison official is liable "only if he knows that the inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

> To establish deliberate indifference in the context of the Eighth Amendment, the prisoner must show that the defendants (1) were aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn and (2) that they actually drew an inference that such potential for harm existed.

Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998) (citing *Farmer*, 511 U.S. at 837). "Under exceptional circumstances, a prison official's knowledge of a substantial

risk of harm may be inferred by the obviousness of a substantial risk." *Id.* (citing *Farmer,* 511 U.S. at 842 & n.8).

> The Supreme Court has recently reaffirmed that "deliberate indifference" is a *stringent* standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. . . . The "deliberate indifference" standard permits courts to separate omissions that "amount to an intentional choice" from those that are merely "unintentionally negligent oversight[s]."

Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 551 (5th Cir. 1997) (citing *Board of County Comm'rs v. Brown,* 117 S. Ct. 1382, 1391 (1997) (other citations omitted) (emphasis added). " 'Subjective recklessness,' " as used in the criminal law, is the appropriate test for deliberate indifference." *Norton,* 122 F.3d at 291 (citing *Farmer,* 511 U.S. at 838-40).

In this case, plaintiff has failed to show either component of the test. None of plaintiff's complaints rise to the level of a constitutional violation, as outlined below. However, even if they did, plaintiff has alleged no facts which show that the defendants or any other party acted with "deliberate indifference" in either creating these conditions or failing to respond to them. Plaintiff has not alleged a "serious risk of harm" and has not alleged facts sufficient to show that defendants actually drew an inference that an excessive risk of harm to plaintiff existed.

2. Recreation

Clifford complained that he was provided with only one hour of weekly outdoor recreation instead of three hours. This complaint is legally frivolous, wholly fails to state a claim and must be dismissed under Rule 12(b)(6).

Inmates have no protected liberty interest in specific recreational opportunities. *Lato v. Attorney Gen.*, 773 F. Supp. 973, 978 (W.D. Tex. 1991) (citing *Beck v. Lynaugh*, 842 F.2d 757, 762 (5th Cir. 1988)). To succeed on a claim under Section 1983 for lack of exercise provisions, a prisoner must set forth facts sufficient to "support the existence of any health hazard under the specific circumstances involved." *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir.), *amended in part, vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); *Green v. Ferrell*, 801 F.2d 765, 771 (5th Cir. 1986). In *Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988), the Seventh Circuit upheld the district court's finding that prison officials' denial of recreation or yard exercise to plaintiff for twenty-eight days while he was confined in segregation did not violate the Eighth Amendment. The Court emphasized that this was a "short term" situation. *Id.* "If exercise is what Harris desperately wanted he could have improvised temporarily with jogging in place, aerobics, or pushups." *Id.*

In this case, Clifford's complaint is that he received only one hour of weekly outside recreation instead of three hours. There is no constitutional mandate requiring three hours rather than one hour of outdoor recreation per week. Plaintiff has made no allegations of health hazards resulting from being allowed to exercise outdoors for one hour per week instead of his desired

three hours per week and there was no prohibition against exercise inside his cell. This complaint fails to state a cognizable Section 1983 claim.

3. Showers and Broken Sink

Clifford complained that the sink did not work during his incarceration at STPJ and that thirty inmates had to share three showers, only two of which worked. Plaintiff testified that he was permitted to shower daily. He also testified that when he was in lockdown he was permitted to shower on Monday, Wednesday and Friday.

As to the conditions about which Clifford complained, he has alleged nothing more than temporary discomforts that are not sufficient to state a claim of constitutional dimension. *Holloway v. Gunnell,* 685 F.2d 150, 155 (5th Cir. 1982). Courts have repeatedly held that the Constitution does not mandate prisons with comfortable surroundings or commodious conditions. *Talib v. Gilley,* 138 F.3d 211, 215 (5th Cir. 1998). In *Dorrough v. Hogan,* 563 F.2d 1259, 1262 (5th Cir. 1977), the Fifth Circuit found that a "prisoner's individual hygienic needs are adequately met by . . . access to the shower facilities at least two, generally three, times a week." In *Walker v. Mintzes,* 771 F.2d 920, 928 (6th Cir. 1985), the Sixth Circuit upheld as constitutional one shower per week for prisoners in administrative segregation and three showers per week for prisoners in the general population. The Seventh Circuit has also found one shower per week sufficient to meet constitutional standards. *Davenport v. DeRobertis,* 844 F.2d 1310, 1316 (7th Cir. 1988). Thus,

plaintiff states no constitutional violation concerning the showers.

Plaintiff also alleges that the sink was not working properly during his six month incarceration at STPJ. Plaintiff has not alleged that he suffered any harm from this condition of confinement. He has not alleged that he could not brush his teeth or meet his other sanitary needs while in his daily shower. A minor sanitation restriction or problem, although admittedly unpleasant, does not amount to cruel and unusual punishment. *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir. 1994); *Knop v. Johnson*, 977 F.2d 996, 1013 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993); *Robinson v. Illinois State Correctional Center*, 890 F.Supp. 715, 720 (N.D. Ill. 1995). "[J]ails must provide only reasonably adequate hygiene and sanitation conditions. *Burton v. Cameron County*, 884 F. Supp. 234, 241 (S.D. Tex. 1995) (citing *Green v. Ferrell*, 801 F.2d 765, 771 (5th Cir. 1986).

At best Clifford's allegations amount to claims of negligence when he asserts that the sink and one shower did not work properly. However, claims arising from allegedly negligent acts do not give rise to relief under Section 1983. The Supreme Court has held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss or injury to life, liberty or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986). In a number of contexts, other courts have determined that allegations amounting to negligence cannot support a Section 1983 claim. *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (negligent medical care); *Hare v. Corinth*, 74 F.3d 633, 641-42, 646 (negligence insufficient to support

failure to protect claim under section 1983); *Eason v. Thaler,* 73 F.3d 1322, 1328-29 (5th Cir. 1996) (negligence cannot support Section 1983 action for deprivation of religious rights or for an Eighth Amendment claim based upon prison officials' alleged gross negligence in permitting a gas leak to occur); *Doe v. Taylor Independent School District,* 975 F.2d 137, 142 (5th Cir. 1992), *vacated on other grounds,* 15 F.3d 443 (5th Cir. 1994) ("Even when constitutional liberty interests are implicated, not all bodily injuries caused by state actors give rise to a *constitutional* tort, for it is well settled that mere negligence does not constitute a deprivation of due process under the Constitution."). Thus, plaintiff's claims regarding alleged unconstitutional sanitary conditions during his confinement are legally frivolous and fail to state a claim upon which relief can be granted.

D. Due Process Prior to Disciplinary Confinement

Clifford claims that defendants violated his due process rights when they did not provide proper disciplinary procedures before placing him in lockdown on four separate occasions. Plaintiff alleges that STPJ officials did not follow the disciplinary procedures outlined in the STPJ handbook, which included providing inmates with "write-ups" of the charges, notice of hearing and a hearing on the alleged disciplinary charge. Clifford alleged that he received only verbal lockdown orders.

Clifford testified that his punishment in lockdown consisted of not being allowed to leave his cell, except to take a shower on Monday, Wednesday and Friday. He testified that apart from being unable to leave his cell

except for showers, he was not denied any other privileges. Clifford did not allege that he lost good time or other credit that would have shortened the length of his imprisonment as a result of the disciplinary procedures.

In *Sandin v. Connor*, 115 S. Ct. 2293, 2299 (1995), the Supreme Court held that analysis of a prisoner's due process claim relating to prison disciplinary action begins with determining whether a constitutionally protected liberty interest exists. "Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). In *Sandin*, the Supreme Court recognized that although the States may create liberty interests, "these interests will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 115 S. Ct. at 2299 (citations omitted). Thus, in *Sandin*, where a prisoner was placed in disciplinary segregation for thirty days and the discipline did not inevitably affect the duration of his sentence, the Court held that due process does *not* require that a prisoner be afforded the procedural mechanisms previously prescribed in *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Hewitt*, 459 U.S. at 460.

Under *Sandin*, Clifford's confinement in lockdown without a copy of the disciplinary charge or a hearing is not an "atypical and significant hardship on the inmate in relation to the ordinary incident of prison life," *Sandin*, 115 S. Ct. at 2299, and no particular procedures were constitutionally required before he was placed in lockdown. The Supreme Court intimated in *Sandin* that prison disciplinary proceedings resulting in the loss of good

time or other extension of sentence may result in an "atypical and significant hardship on the inmate in relation to the ordinary incident of prison life" implicating due process concerns because it affects the duration of the inmate's imprisonment. *Sandin*, 115 S. Ct. at 2298-2300.

In the instant case, Clifford's testimony and his written submissions establish that he lost no good time or other credit toward early release and that the duration of his sentence was in no way affected by defendants' alleged actions. Thus, under *Sandin*, he was entitled to no particular process. In addition, regarding plaintiff's complaint that defendants did not follow the STPJ handbook disciplinary procedures before placing plaintiff in lockdown, the Fifth Circuit has held that allegations that a prison official has failed to follow the prison's own rules, regulations or procedures cannot support a Section 1983 claim, without an independent constitutional violation. *Eason*, 73 F.3d at 1324-26. Thus, defendants' alleged noncompliance with their own disciplinary rules does not implicate plaintiff's constitutional rights in a way that might serve as a basis for Section 1983 relief.

For all of the foregoing reasons, plaintiff fails to state a due process claim concerning his placement in lockdown for which he would be entitled to relief.

E. Failure to Protect from Attack by Another Inmate

Clifford has alleged that STPJ officials and Deputy United States Marshals Gibbs, Goode and Couret failed to protect him from attack by inmate Brown. Specifically,

plaintiff testified that after his third fight with Brown he told STPJ Deputy Mayo that there would probably be further trouble between plaintiff and Brown. Plaintiff conceded that he did not file any ARP grievances at STPJ concerning prison officials' alleged failure to protect him from attack by Brown. Accordingly, for the reasons discussed above, plaintiff's claim against STPJ officials must be dismissed pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies available as to complaints against STPJ officials within the prison facility. This claim should also be dismissed against Deputy United States Marshals Gibbs, Goode and Couret, however, because plaintiff failed to allege facts sufficient to constitute deliberate indifference by the deputy marshals as required to state a claim for failure to protect plaintiff under the Eighth Amendment.

Under the Eighth Amendment, prison officials have a duty to protect inmates from violence by other inmates. *Farmer*, 511 U.S. at 833; *Hare*, 74 F.3d at 650. As discussed above in connection with plaintiff's claims regarding the alleged unconstitutional conditions of confinement, the Eighth Amendment standard enunciated in *Farmer* applies. Again, this Court must determine if the alleged deprivation was "sufficiently serious," which means that "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm," and if defendants were deliberately indifferent to inmate health or safety, *Farmer*, 511 U.S. at 834; *Newton v. Black*, 133 F.3d 301, 308 (5th Cir. 1998), all as those terms are more fully defined above.

Clifford alleges that he was involved in four fights with Brown. Plaintiff testified that on April 1, 1998, the

first fight began suddenly and unexpectedly between him and Brown while they were playing cards, the fight was *not* observed by prison officials, and it was broken up by other inmates. Plaintiff testified that he had not been in any arguments or altercations with Brown prior to this incident. The second fight occurred within minutes of the first fight after Brown returned from his cell and attacked plaintiff again. This fight was broken up by prison officials, and plaintiff and Brown were immediately placed in twenty-four hour lockdown in their separate cells. The third fight occurred on April 2, 1998 when plaintiff and Brown were simultaneously released from their separate cells, which were six feet apart, at the termination of lockdown. Upon their release from the cells, Clifford asked Brown "if it was over" and Brown replied "no," charged Clifford and began fighting with him again. Plaintiff suffered a bloody nose, and they were both again placed in twenty-four hour lockdown in their respective cells. The final fight occurred on April 4, 1998 when Brown attacked plaintiff upon their simultaneous release from lockdown in their respective cells. Brown allegedly struck plaintiff in the face with his fist for three or four minutes before STPJ officials stopped the fight, and plaintiff suffered a fractured maxillary sinus, right orbital rim and thyroid cartilage.

Clifford's testimony and written submissions regarding his first and second fights with Brown, which occurred within minutes of each other on April 1, do not establish that he was exposed to a substantial risk of serious harm as to which defendants were deliberately indifferent because no one had any reason to believe at that time that there might be trouble between these

inmates, who had no difficulties in the past and whose initial altercations erupted suddenly and without warning during a card game.

Similarly, as to the third fight, there is nothing in Clifford's written submissions or testimony from which it could be inferred that defendants were both aware of facts and actually drew the inference that simultaneously releasing Brown and Clifford from lockdown exposed Clifford to a substantial risk of harm. Although two brief skirmishes had previously occurred between Brown and Clifford, they had been immediately placed in lockdown in separate cells for a 24-hour cooling off period. Neither had yet been seriously injured. Clifford's question to Brown – "if it was over" between them – indicates not only that Clifford himself did not feel a substantial risk of serious harm but also that his own comment precipitated Brown's renewed attack, which like the first two fights was sudden and unanticipated. Under these circumstances, it cannot be concluded that any defendant was both aware of facts from which the inference could be drawn that a substantial risk of serious harm to Clifford existed and that they also actually drew that inference.

Thus, only the final fight between Brown and Clifford occurring when they were again simultaneously released from another 24-hour lockdown remains for disposition. Again, defendants cannot be held liable on this claim "unless the official knows of and disregards an excessive risk to inmate health or safety; the official *must both be aware of facts* from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*" *Farmer*, 511 U.S. at 837 (emphasis added); *accord Newton*, 133 F.3d at 308.

Clifford testified that after the *third* fight he told STPJ Deputy Mayo that there would probably be further problems between Clifford and Brown and Mayo replied that he would speak to the STPJ lieutenant about it. Of course, by this time STPJ deputies knew the two inmates had been in three fights over a period of a few days. Even assuming, however, that these are facts from which the inference could be drawn that a substantial risk of harm existed, there remains nothing from which it could be concluded that any defendant actually drew the inference. Plaintiff was a federal inmate housed in a section of STPJ reserved exclusively for federal inmates. Plaintiff was under the immediate control and supervision of St. Tammany jail officials. As discussed above, even if plaintiff could demonstrate that the STPJ defendants actually drew the required inference from the facts about which they were aware, the STPJ defendants cannot be held liable for failing to protect plaintiff from attack by Brown because plaintiff neither initiated nor exhausted the administrative remedies that were available to him against these defendants at STPJ. 42 U.S.C. 1997e(a).

As to the deputy United States marshals who are defendants, Clifford's written materials and testimony make it clear that they had no notice of any facts from which they might have drawn any inference that Clifford was exposed to a substantial risk of serious harm before his final fight with Brown. The verified medical records indicate that Nurse Joann Fortenberry at STPJ notified the marshal's office on April 4 after Clifford's final fight with Brown at the time the nurse was arranging to send Clifford to the hospital. Record Doc. No. 77 (St. Tammany Parish Hospital Emergency Record, 4/4/98). Plaintiff's

written submissions repeatedly contain the allegation that the Marshal's service was notified of his situation on April 4, after his last fight with Brown when for the first time his injuries were severe enough to require extensive medical treatment. Record Doc. No. 42 (Plaintiff's Compliance with Court's Order of June 12, 1998 at ¶s 35-41, p.4); Record Doc. No. 81 (Plaintiff's Cover Sheet Describing Documents at ¶s 5 and 6). Thus, while Clifford's allegations are clear that the deputy marshal defendants were notified of his situation after the final fight on April 4, and removed Brown to another jail at that time, there is nothing that tends to establish their prior knowledge of facts sufficient to state a constitutional violation of failure to protect Clifford from harm.

For all of the foregoing reasons, Clifford fails to state a claim cognizable under Section 1983 that his constitutional rights were violated because defendants failed to protect him from Brown, and this claim must be dismissed.

F. Use of Excessive Force

Clifford also claims that STPJ deputies used excessive force when the sprayed him with pepper spray while trying to break up a fight between plaintiff and Brown on April 2, 1998. Plaintiff complained that he had to wait twenty minutes before being allowed to rinse off the pepper spray residue.

When a convicted inmate brings an excessive force claim under the Eighth Amendment, the appropriate inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and

sadistically to cause harm." *Baldwin v. Stalder*, 137 F.3d 836, 838 (5th Cir. 1998) (quoting *Hudson*, 503 U.S. at 7). Factors to be considered in resolving this issue are "1. the extent of the injury suffered; 2. the need for the application of force; 3. the relationship between the need and the amount of force used; 4. the threat reasonably perceived by the responsible officials; and 5. any efforts made to temper the severity of a forceful response." *Id.* at 839 (citations omitted).

Considering these factors, plaintiff fails completely to state a claim because it is clear from Clifford's own testimony that the pepper spray was used against Clifford in a good faith effort to maintain or restore discipline, rather than maliciously and sadistically to cause plaintiff harm. As to the first factor, Clifford suffered no significant or permanent injury as a result of being pepper-sprayed. Plaintiff's own testimony establishes that a need to apply force clearly existed because Clifford and Brown were fighting, and the officers reasonably perceived the fight between two inmates as a threat to prison control or discipline. Finally, the deputies made efforts to temper the severity of their use of pepper spray by permitting Clifford to rinse off the residue after the pepper spray was used. *See Baldwin*, 137 F.3d at 838-41 ("two second burst of pepper mace" was not excessive force and was justified after inmates ignored three orders to stop disruptive behavior.)

Plaintiff's testimony establishes an appropriate correlation between the need for force and the amount of force used. Plaintiff testified that he and Brown were in each other's grasp and that they were sprayed so that they would disengage and stop fighting. The fight posed

a threat to order, discipline, prison security and the safety of STPJ officials and the inmates themselves. The use of pepper spray was justified, and the severity of the effects of the pepper spray were subsequently tempered. *See id.* at 838 (no constitutional violation when mace-sprayed inmates could not wash for three hours after spraying). Plaintiff's excessive force claim is legally frivolous and fails to state a claim upon which relief can be granted.

G. Inadequate Medical Care

In this case, Clifford was a convicted prisoner at all relevant times. To succeed on a claim for damages based on constitutionally inadequate medical care, a convicted prisoner must demonstrate that defendants had subjective knowledge of a substantial risk of serious harm to the plaintiff but responded with deliberate indifference to that risk. *Hare*, 74 F.3d at 650.

Plaintiff testified that he was punched in the face by Brown during their final fight on April 4, 1998, resulting in a fractured maxillary sinus, right orbital rim and thyroid cartilage. Assuming that plaintiff's medical conditions were serious, *see Oldham v. Chandlor-Halford*, 877 F. Supp. 1340, 1355 (N.D. Iowa 1995) (fractured wrist is a serious medical need), he has alleged facts, confirmed by the medical records, that negate any possible inference of deliberate indifference by jail officials.

Clifford's complaint, as amended by his testimony and confirmed by the verified medical records, establishes that he received substantial medical care reasonably and appropriately responsive to his medical complaints while incarcerated in STPJ. Plaintiff testified

that he was taken to the St. Tammany Parish Hospital an hour and a half following his final fight with plaintiff on April 4, 1998, where he was given an x-ray, prescribed motrin and diagnosed with multiple contusions. Plaintiff also testified and the medical records confirm that following his initial hospital visit he was examined at least three times by STPJ Dr. Ballard; he was taken back to the hospital and given a CT scan on April 9, 1998; he was examined by an ENT specialist, Dr. Beatrous, at his private office in Mandeville; and he was awaiting an MRI at the time of his transfer from STPJ.

Plaintiff's principal complaint is that he was misdiagnosed with multiple contusions by Dr. Matta, the attending physician at St. Tammany Parish Hospital on April 4, 1998, and that he was not correctly diagnosed with a fractured maxillary sinus, right orbital rim and thyroid cartilage until April 9, 1998, when he was returned to the hospital and a CT scan was taken. Clifford complains that during the five days of his alleged misdiagnosis, he should have been receiving different, more extensive treatment for his fractures and, thus, his maxillary sinus may not have healed properly.

While it is clear from plaintiff's allegations and testimony that he is not satisfied with the medical care he received, it is equally clear that the medical care provided was reasonable. Certainly, no finding of deliberate indifference to his medical needs can be made based on this record. Contentions like Clifford's that amount to a mere disagreement with the quality or extent of medical treatment or even negligence do not give rise to a Section 1983 claim. *Norton*, 122 F.3d at 291-92; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *see Mendoza*, 989 F.2d at 193

(prisoner's disagreement with the type or timing of medical services provided cannot support a Section 1983 claim); *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (allegations establishing provision of medical treatment found inconsistent with inference of deliberate indifference).

At best, Clifford's allegations amount to claims of negligence because plaintiff claims that he was misdiagnosed, incorrectly treated and should have received different treatment sooner. However, claims arising out of allegedly negligent acts do not give rise to relief under Section 1983. The Supreme Court has held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss or injury to life, liberty or property." *Daniels*, 474 U.S. at 328; *Davidson*, 474 U.S. at 347. In addition, as noted above, mere disagreement or dissatisfaction with the type or extent of medical treatment provided cannot support a Section 1983 claim. *Varnado*, 920 F.2d at 321; *Mendoza* 989 F.2d at 193. Therefore, to the extent plaintiff alleges that defendants were negligent in misdiagnosing him or failing to provide him with the appropriate treatment, he fails to state a cognizable claim that his constitutional rights were violated.

H. Two Month Delay in Receiving Special Diet

Clifford's claim that he experienced a two-month delay in receiving a special diet required by his medical condition must also be evaluated under the same standards concerning alleged inadequate medical care described above. Plaintiff testified that he suffers from hypoglycemia and that this condition required that he be

provided a high protein and low carbohydrate diet. Plaintiff testified that he began his incarceration at STPJ in January 1998, at which time he informed jail officials of his medical condition and requested the special diet. Clifford stated that he did not receive the special diet until March 1998. Although plaintiff has alleged delay in receiving his diet to control his medical condition, his allegations do not rise to the level of deliberate indifference necessary to establish a cognizable claim that his constitutional rights were violated.

Mere delay in receiving care is not in and of itself a constitutional violation. *Mendoza*, 989 F.2d at 195; *Wesson*, 910 F.2d at 284; *Simons v. Clemons*, 752 F.2d 1053, 1056 (5th Cir. 1985). Regardless of the length of delay, plaintiff "must, at a minimum, allege 'deliberate indifference' to . . . 'serious' medical needs." *Wilson*, 501 U.S. at 296. *See Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1188 (11th Cir. 1994) (citing *Monmouth County v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) ("Where delay [in medical care] results in an inmate's suffering 'a lifelong handicap or permanent loss, the medical need is serious.' ") Plaintiff suffered no significant injury as a result of waiting two months to receive his special diet. Thus plaintiff has alleged mere delay in this regard and fails to state a claim for relief under Section 1983.

I. STPJ Officials Violated 18 U.S.C. 4086

Finally, plaintiff asserts that defendants violated 18 U.S.C. § 4086, which plaintiff alleges governs the housing of federal prisoners in state facilities. Section 4086 states:

"United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution." Plaintiff alleges that STPJ officials breached their contract with the U.S. Marshal's Service and, therefore, violated Section 4086. This provision appears in the United States Criminal Code, and my research has uncovered no legal authority to support plaintiff's view that it creates a private cause of action against any of the defendants in this case.

RECOMMENDATION

For all of the foregoing reasons, it is **RECOMMENDED** that plaintiff's complaint be **DISMISSED WITH PREJUDICE** as legally frivolous and/or for failure to state a claim under 28 U.S.C. § 1915(e)(2) and 42 U.S.C. § 1997e(c)(1).

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this 9th day of February, 1999.

/s/ Joseph C. Wilkinson, Jr.
JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30302

FILED
FEB 9 2000

DAVID DREW CLIFFORD

Plaintiff-Appellant

v.

RON GIBBS, US Marshals Service, in his official & private Capacity; JACK STRAIN, in his official & private capacity; T GOODE, US Marshal; R COURET, US Marshal; WARDEN LONGINO; UNIDENTIFIED PARTIES; TED BRUSTOWICZ, Coroner, St Tammany Parish; GREGORY SMITH; LUIS F. MATTA, Dr

Defendants-Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

(signed by James L. Dennis)
UNITED STATES CIRCUIT JUDGE